

DRAFTING GLITCHES IN THE RELIGIOUS LIBERTY AND CHARITABLE DONATION PROTECTION ACT OF 1998: AMEND § 548(A)(2) OF THE BANKRUPTCY CODE

INTRODUCTION

The U.S. Constitution mandates that Congress shall make no law establishing a religion or prohibiting exercise of religion,¹ and it empowers Congress to develop a uniform system of bankruptcy throughout the states.² While these provisos seem unrelated, they have come into conflict over how an individual's religious right to tithe is affected by bankruptcy proceedings.³ Specifically, courts have often forced religious institutions to return tithes given to them by congregation members who filed for bankruptcy soon after making the donation.⁴ Recent amendments to the Bankruptcy Code ("Code") have added confusion as to the amount of donation that is safe from recovery in bankruptcy proceedings.

Congress passed legislation on several occasions that would resolve the conflict between the religious organizations' desire to keep tithes given by debtors and general principles of fairness to creditors that are essential to bankruptcy proceedings; the most recent attempt was the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA").⁵ Prior to passage of RLCDPA, which contains explicit provisions on charitable and religious donations, courts and Congress evaluated several schemas for analyzing the

¹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

² U.S. CONST. art. I § 8, cl. 1, 4 ("The Congress shall have the Power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

³ See Oliver B. Pollack, *Religious Tithing, Fraudulent Transfers in Bankruptcy, and the Religious Freedom Restoration Act*, 6 J. BANKR. L. & PRAC. 209 (1997) ("To inhibit tithing is to interfere with religious practice. To permit tithing in bankruptcy inadvertently supports and subsidizes religion at the expense of unsecured creditors.").

⁴ *Morris v. Midway Southern Baptist Church (In re Newman)*, 203 B.R. 468 (D. Kan. 1996); *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886 (Bankr. D. Minn. 1992), *aff'd*, 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F. 3d 1407 (8th Cir. 1996), *rev'd*, 141 F. 3d 854 (8th Cir. 1998).

⁵ Pub. L. No. 105-183, 112 Stat. 517 (1998).

intersection between religious rights and bankruptcy.⁶ Many bankruptcy courts evaluated tithing under fraudulent transfer statutes determining if the debtor received a return of “reasonably equivalent value” for the tithes.⁷ While courts were sympathetic to debtors’ First Amendment arguments in support of allowing debtor tithing, there was no easy statutory way to permit the transfer of funds. Courts had no way to assess the value of a debtor’s religious beliefs to determine if he had received reasonably equivalent monetary value. The only available analysis was to scrutinize the monetary benefit of the contribution, and see if the debtor received a monetarily reasonably equivalent value for the donation.⁸ But under this analysis, tithes and other donations to religious causes were often, though not always,⁹ found to be fraudulent transfers that were not protected from the bankrupt estate. Thus, religious organizations were often forced to return donations given to them by debtors.¹⁰

The Religious Freedom Restoration Act (“RFRA”) of 1993 addressed this problem, though indirectly. RFRA directed courts to apply “strict scrutiny” to state and federal laws and regulations that placed a burden on religion.¹¹ In short, this meant that if a statute or regulation could be construed to be restrictive of religious freedom, belief, or practice, the government would have to show it had a compelling interest in the restriction and that it had tailored the statute narrowly to minimize the impact on religion.¹² The bankruptcy courts

⁶ See generally Oliver B. Pollack, “Be Just Before You’re Generous”: Tithing and Charitable Contributions in Bankruptcy, 29 CREIGHTON L. REV. 527, 553 (1996) (analyzing how courts would either not permit tithing and dismiss the case, look at tithing as part of the totality of the circumstances, or suggest that chapter 7 relief was more appropriate).

⁷ See, e.g., *In re Sturgeon*, 51 B.R. 82, 84 (Bankr. S.D. Ind. 1985) (“As a matter of law then the Court concludes that under the circumstances of this case the tithing of \$140.00 per month is not a necessary living expense and that the debtor should commit this amount to her plan as it is part of her disposable income.”). But see, e.g., *In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989) (“Religious participation is a fundamental part of many people’s lives. That is a fact in this case. The church tithes is a condition precedent to full participation in the debtor’s religion, and the proposal to incur that expense unquestionably serves a bona fide religious and spiritual purpose. . . . In that context, the tithes is a proper item of proposed budget expense. Since the amount is an integral part of the religion rather than a discretionary donation, it is, as noted, beyond the purview of this court’s inquiry.”).

⁸ See *In re Newman*, 203 B.R. 468; *In re Young*, 148 B.R. 886.

⁹ See, e.g., *In re Navarro*, 83 B.R. 348 (Bankr. E.D. Pa. 1988).

¹⁰ See *In re Newman*, 203 B.R. 468; *In re Young*, 148 B.R. 886.

¹¹ 42 U.S.C. § 2000bb-3 (1993) (noting that under RFRA, even purportedly neutral laws statutory language could put an unnecessary burden on religion).

¹² RFRA was the congressional response to the Supreme Court decision in *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *reh’g denied*, 496 U.S. 913 (1990), where the Court decided not to apply the “compelling state interest” test to instances when law effectively burdened religion. Rather, the Court ruled that the government need only show that the statute was of general applicability and did not directly interfere with religion. For more thorough analyses of *Smith*, RFRA, and tithing, see Susan D. Franck,

were split in their reception of RFRA: some were concerned with its constitutionality,¹³ while others welcomed it as a statutory basis to defend religious freedom.¹⁴ These latter courts saw RFRA as a palpable way to allow religious institutions to keep debtors' donations.

However, after the Supreme Court's decision in *City of Boerne v. Flores*,¹⁵ the constitutionality of RFRA was generally questioned, and bankruptcy courts were hesitant to rule on its applicability to the Code, which is federal law.¹⁶ Some courts called RFRA wholly unconstitutional;¹⁷ most insisted that RFRA still remained binding on Congress.¹⁸

In response, Congress passed the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA").¹⁹ RLCDPA attempted to protect tithes given to religious institutions by individual debtors preceding bankruptcy from attack by trustees attempting to recover them as fraudulent transfers.²⁰ RLCDPA was to be applied alongside RFRA, if it was still good

Comment, Christians v. Crystal Evangelical Free Church: *Interpreting RFRA in the Battle Among God, the Government, and the Bankruptcy Code*, 81 MINN. L. REV. 981 (1997); Thomas M. Walsh, Note, *Religious Liberty and Charitable Donation Act of 1998: Putting the Fear of God into Bankruptcy Creditors*, 7 AM. BANKR. INST. L. REV. 235 (1999); Jool Nie Kang, Comment, *Tithing: A Fraudulent Transfer or a Moral Obligation?*, 18 BANKR. DEV. J. 399 (2002).

¹³ *In re Saunders*, 215 B.R. 800 (Bankr. D. Mass. 1997). The court voiced its concern stating:

The application of RFRA to Chapter 13 plans with the effect of permitting tithing imposes a necessity for "continuing surveillance leading to an impermissible degree of entanglement" into the mind and soul of a debtor. I reject the cases which hold that tithing is a protected First Amendment activity and should be granted particular protection. I find that, if RFRA directs me to permit tithing in a Chapter 13 plan, it most excessively entangles me with religion and is unconstitutional.

Id. at 806; see also *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995); *In re Gomes*, 219 B.R. 286, 295 (Bankr. D. Or. 1998).

¹⁴ See *In re Turner*, 193 B.R. 548, 555 (Bankr. N.D. Cal. 1996).

¹⁵ 521 U.S. 507 (1997).

¹⁶ See, e.g., *In re Gomes*, 219 B.R. at 293-94 ("I do not need to reach any issues regarding the constitutionality of RFRA or the application of RFRA strict scrutiny versus the *Smith* reasonableness standard."); see also Bruce W. Megard, Jr., *Tithing and Fraudulent Transfers in Bankruptcy: Confirming a Trustee's Power to Avoid the Tithe After City of Boerne v. Flores*, 71 AM. BANKR. L.J. 413 (1997) (arguing that RFRA did not burden religion or religious debtors to a constitutionally impermissible degree).

¹⁷ See, e.g., *In re Andrade*, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997) ("Debtors contend that the Religious Freedom Restoration Act precludes this court from interfering with Debtors' tithing. However, the Act was recently declared unconstitutional by the Supreme Court in *City of Boerne*. . . . Obviously, Debtors may not rely upon the Act now.").

¹⁸ See *In re Bloch*, 207 B.R. 944, 951 (Bankr. D. Colo. 1997).

¹⁹ Pub. L. No. 105-183, 112 Stat. 517 (1998).

²⁰ *Id.*

federal law,²¹ or independently if RFRA proved unconstitutional.²² Congress's zeal to protect the rights of American tithe-givers in their religious practice led to swift passage of RLCDDPA, which passed unanimously in the Senate and overwhelmingly in the House of Representatives.²³ But in their haste to protect these religious donations, Congress made drafting glitches that should be solved simply by legislative amendments, rather than judicial interpretation.²⁴

Section I (A-B) of this Comment will illuminate this conflict by exploring the plain meaning of RLCDDPA, specifically its amendments to § 548(a)(2) of the Code, using both general canons of statutory construction and the Dictionary Act of the Code. Section I (C) will analyze the Act's plain meaning under the lens of its legislative intent within RLCDDPA that amended § 548(a)(2) of the Code.²⁵ Section I (D) will address the two leading cases on this issue—*In re Zohdi* (“Zodhi”)²⁶ and *Universal Church v. Geltzer* (“Geltzer”).²⁷ Finally, the Conclusion of this Comment will offer simple and necessary alternative amendments to § 548(a)(2) to unequivocally state its statutory purpose and meaning.

²¹ S. 1244, 105th Cong. § 6 (1998) (“Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993.”).

²² See, e.g., John, K. Turner, *Giving God the Unavoidable Preference: Tithing and the Religious Liberty and Charitable Donation Protection Act of 1998*, AM. BANKR. INST. J., Nov. 2000, at 8, 8.

²³ It was merely 262 days from proposal to enactment. See Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 157–58 (2001).

²⁴ Immediately following RLCDDPA's passage, scholars were calling for amendments to § 548(a)(2)(A); still, none of these simple changes have been made. See Walsh, *supra* note 12, at 255 n. 125 (“By striking “that contribution does” and replacing it with “aggregate contributions may,” section 548(a)(2) of the Code, Section 3—Treatment of Pre-Petition Qualified Charitable Contributions of the Religious Liberty Act, [should] now read: (A) the amount of aggregate contributions may not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made.”).

²⁵ Previous law review articles have touched on this issue, but have not done in-depth analyses of the issue, perhaps because *Zohdi* did not directly deal with the issue and *Geltzer* is a more recent case. See Walsh, *supra* note 12, at 260 (“[T]he Religious Liberty Act is overbroad, creating the possibility of multiple contributions as long as each contribution does not exceed 15% of the debtor's gross income.”).

²⁶ *Murray v. La. State Univ. Found. (In re Zohdi)*, 234 B.R. 371 (Bankr. M.D. La. 1999).

²⁷ *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 961 (2007).

I. INTERPRETING RLCDDPA

A. *Passage of RLCDDPA*

On June 19, 1998, President Bill Clinton signed RLCDDPA into law.²⁸ The President issued a brief statement expressing his strong support of the new law and explaining the purpose he believed it served.²⁹ President Clinton's statement stressed the importance of community: protecting religious and charitable groups safeguards important facets of communities by shielding "donations made in good faith by our citizens to their churches and charitable institutions."³⁰ True to these comments, RLCDDPA, on its face, meant to protect religious and charitable organizations from recovery actions brought by bankruptcy trustees.

President Clinton's statement pertained to RLCDDPA as a whole, which amended five sections of the Code.³¹ Section 548(a)(2), as amended by RLCDDPA in 1998 states, in whole, that:

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—(A) *the amount of that contribution does not exceed 15% of the gross annual income of the debtor* for the year in which the transfer of the contribution is made; or (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.³²

More generally, § 548 of the Code allows a bankruptcy trustee to recover (that is, bring back into the estate) fraudulent transfers in a defined period (now two years) preceding bankruptcy.³³ These transfers include ones for which the debtor's estate did not receive reasonably equivalent value. The amendments

²⁸ Statement on Signing the Religious Liberty and Charitable Donation Protection Act, 34 WEEKLY COMP. PRES. DOC. 1778 (June 19, 1998).

²⁹ *Id.*

³⁰ *Id.*

³¹ Religious Liberty and Charitable Donation Protection Act, Pub. L. No. 105-183, 112 Stat. 517 (1998). The amended sections are §§ 544, 546, 548, 707, and 1325. *Id.* The amendments to § 548, though, are the substantive amendments protecting tithes, while the other amendments update the cross references based on these changes and clarify how the changes to § 548 affect confirmation or dismissal of a bankruptcy case.

³² 11 U.S.C.A. § 548(a)(2) (West 2007) (emphasis added).

³³ The BAPCPA amendments to the Code expanded the reach-back period in § 548(a)(2)(A) from one year to two years. *Id.*

to the Code added by RLCDDPA carve out an exception to the reasonably equivalent value analysis for gifts meeting the criteria indicated above.

However, the criteria Congress set for avoiding such transfers are unclear. Section 548(a)(2)(A) facially is ambiguous because it refers to all transfers and contributions strictly in their singular forms. It reads:

[A] transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—(A) the amount of that contribution does not exceed 15% of the gross annual income of the debtor for the year in which the transfer of the contribution.³⁴

This language is vague as to whether (1) it is the amount of an individual contribution that cannot exceed 15 percent of the debtor's gross annual income ("individual donation"), or (2) whether the cumulative value of all of the debtor's contributions in a year cannot be greater than 15 percent of his gross annual income to be protected ("aggregation"), notwithstanding prior practice of consistently more generous giving.³⁵ If § 548(a)(2)(A) applies to individual donations, then a debtor could conceivably give all of his income, in individual transfers of less than 15 percent, to charities or religious organizations; if § 548(a)(2)(A) applies in the aggregate, then a debtor's total giving could not exceed 15 percent of his gross annual income, and all donations in excess of this would be recoverable by the trustee. To resolve the discrepancy, it is first necessary to understand common principles of statutory interpretation and then, more specifically, rules pertaining to the Code.

B. Canons of Construction and Analysis

Canons of statutory construction commonly used to aid courts in their interpretation of statutory language are well established. A key canon, simply stated, is that "the plain meaning of legislation should be conclusive except in the 'rare cases [in which] the literal application of a statute will produce a

³⁴ 11 U.S.C.A. § 548(a)(2)(A) (West 2007).

³⁵ There is no congressional explanation or widely-accepted definition of "consistent." For instance, in *Jacobson v. Church of Manalapan (In re Jackson)*, 249 B.R. 373, 377 (2000), the court decided to simply consult the Webster's New Collegiate Dictionary definition of "consistent," without having other guidance. In *In re Jackson*, the avoided donation (\$20,000) was ten times the size of the next-largest donation (\$2,000) in the two preceding years. *Id.*; see also John J. Dyer and Gregory Todd Jones, *Judicial Treatment of Charitable Donations in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998*, 2 DEPAUL BUS. & COMM. L.J. 265, 292–93 (2004).

result demonstrably at odds with the intentions of its drafters.”³⁶ The Supreme Court has affirmed this generally understood maxim with regards to the Code.³⁷ Still, some have challenged bankruptcy provisions, including other parts of § 548,³⁸ under the so-called “absurdity doctrine.”³⁹ When a court invokes the absurdity doctrine, it is explicitly going against the plain meaning of a statute to reach a result it perceives to be reasonable.

For a statutory construction to create an “absurd” result, the outcome must not be merely “personally disagreeable, mischievous, or objectionable.”⁴⁰ Rather, the outcome must be “unthinkable, or bizarre, or demonstrably at odds with the intentions of its drafters.”⁴¹ “Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.”⁴² Thus, even if a statute does not “conform to the dictates of common sense,”⁴³ a court must interpret it literally because it is the legislature’s job to correct a miswritten statute, except in extraordinary circumstances.⁴⁴

³⁶ U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); see also *In re Demonica*, 345 B.R. 895, 904 (Bankr. N.D. Ill. 2006).

³⁷ See *Patterson v. Shumate*, 504 U.S. 753, 757 (1992) (“[T]he plain language of the Bankruptcy Code is our determinant”); see also *Bank of America Nat’l Trust & Sav. Ass’n v. 203 LaSalle St. P’ship*, 526 U.S. 434, 459 (1999) (Thomas, J., concurring) (“Our precedents make clear that an analysis of any statute, including the Bankruptcy Code, must not begin with external sources, but with the text itself.”), see also *In re Zohdi*, 234 B.R. 371, 384 (Bankr. M.D. La. 1999) (“[I]n interpreting the Bankruptcy Code, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.”) (internal citations omitted).

³⁸ *In re Zohdi*, 234 B.R. at 381–84.

³⁹ See *id.* at 381 (“The ‘absurdity doctrine,’ of course, is that the plain meaning of the statutory language controls, unless literal application would lead to an unconstitutional or absurd result.”); *In re Richardson*, 217 B.R. 479, 491 (Bankr. M.D. La. 1998); see also *In re Meyer*, 355 B.R. 837, 846 (Bankr. D.N.M. 2006).

⁴⁰ *In re Zohdi*, 234 B.R. at 383 (internal citations omitted).

⁴¹ *Id.* (internal citations omitted).

⁴² *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

⁴³ *In re Zohdi*, 234 B.R. at 384 (quoting *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs. Inc.)*, 157 F.3d 414 (5th Cir. 1998)).

⁴⁴ See *In re Zohdi*, 234 B.R. at 381; see also *In re Pro-Snax*, 157 F.3d at 424–25 (“We decide the issue before us bound by our conventions of statutory construction, even though common sense might lead the lay observer to conclude that a different result is perhaps more appropriate. The law, and the rules to which we adhere to interpret it, does not always conform to the dictates of common sense. . . . Although the legislative history and, indeed, a brief syntactical evaluation of the clause at issue suggest that Congress inadvertently neglected to include [other statutory language], our canons of construction do not require—nay, do not permit—us to consider these exogenous sources when the statute is clear textually on its face.”).

On its face and in the context of the rest of § 548, subsection (a)(2), as amended by RLCDDPA, has parts that are abundantly clear.⁴⁵ “Religious and charitable organizations” are clearly defined in the Internal Revenue Code, and these definitions are incorporated by reference into § 548(d)(4)(A) and (B).⁴⁶ Section 548(a)(1)(B)(i) is the reasonably equivalent value test⁴⁷ that courts struggled to apply to donations before RLCDDPA, and in contexts of transfers in general.⁴⁸ Additionally, § 548(a)(1)(A), which discusses actual intent to defraud, is applicable to donations. Bankruptcy judges can still avoid any donations made by a debtor while he is insolvent if they find that the debtor had an actual intent to defraud his creditors.⁴⁹ These subsections of § 548 are clear, and courts have properly used their directives in defining religious and charitable organizations and in determining actual fraudulent intent.

However, there are parts amended by RLCDDPA that are less clear. Section 548(a)(2)(A) has no cross-references to other parts of the Code (like the reasonably equivalent value test which carries with it pre-RLCDDPA precedent), and it lacks the clarity and broader judicial interpretation of other parts of the Code. Both § 548(a)(2) and § 548(a)(2)(A) refer to the singular “contribution” for analysis under the Code to see if it exceeds 15% of the debtor’s gross

⁴⁵ *But see generally* Klee, *supra* note 23, at 167–68 (“On its face, the Donation Protection Act has no provision to aggregate transfers before application of the fifteen percent of gross income test. Thus, a court might allow a debtor to tithe all of her disposable income to various charities as long as no particular charity receives more than fifteen percent. Courts, however, could interpret the Act to require the aggregation of all charitable contributions. Unless the courts presume aggregation of all charitable contributions, however, in theory, before filing a bankruptcy petition, a debtor could transfer just less than fifteen percent of her annual income to each of seven charities and clean out her estate entirely. The charities would be protected from constructive fraudulent transfer attack.” (internal citations omitted)).

⁴⁶ 11 U.S.C. § 548(d)(4) (2000) (“In this section, the term ‘qualified religious or charitable entity or organization’ means—(A) an entity described in § 170(c)(1) of the Internal Revenue Code of 1986; or (B) an entity or organization described in § 170(c)(2) of the Internal Revenue Code of 1986.”). While there has been some litigation by organizations under the tax code itself, its application to the Code has been a nonissue.

⁴⁷ “The trustee may avoid any transfer . . . if the debtor voluntarily or involuntarily . . . received less than a reasonably equivalent value in exchange for such transfer or obligation. . . .” 11 U.S.C.A. § 548(a)(1)(B)(i) (West 2007).

⁴⁸ Courts were reluctant to make charities and churches return donations of debtors, but the plain language of the statute meant that courts had to grudgingly apply the standard, thus forcing religious organizations to return donations made by debtors. *Morris v. Midway Southern Baptist Church (In re Newman)*, 203 B.R. 468 (D. Kan. 1996); *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886 (Bankr. D. Minn. 1992), *aff’d*, 152 B.R. 939 (D. Minn. 1993), *rev’d*, 82 F. 3d 1407 (8th Cir. 1996), *rev’d*, 141 F. 3d 854 (8th Cir. 1998); *see In re Sturgeon*, 51 B.R. 82, 84 (Bankr. S.D. Ind. 1985); *but see, e.g., In re Bien*, 95 B.R. 281, 283 (Bankr. D. Conn. 1989).

⁴⁹ 11 U.S.C. § 548(a)(1)(A) (2000) (“[I]f the debtor voluntarily or involuntarily made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted,” the transfer was avoidable.).

annual income, which, if nothing else, shows consistency in drafting. As written, § 548(a)(2)(A) also discusses “transfer” in the singular. The question then becomes whether the usage of these terms in the singular is to be read literally, or whether other federal statutory grammatical mandates, which would transform both terms to their plural form, are appropriately used in this context.

Particularly relevant to understanding why there is confusion surrounding § 548(a)(2)(A) is § 102(7) of the Dictionary Act that suggests that, for proper interpretation of the entire Code, “the singular includes the plural.”⁵⁰ But reliance upon the Dictionary Act to solve the § 548(a)(2)(A) conundrum—whether a court should interpret the words “transfer” and “contribution” literally and singularly, or whether the Dictionary Act instructs a court to imply these words in the plural—is a dubious dependence at best.⁵¹ The congressional intent behind § 102(7), expressed two decades prior to RLCDDPA as part of the 1978 amendments to the Code states:

Paragraph (7) specifies that the singular includes the plural. The plural, however, generally does not include the singular.⁵² *The bill uses only the singular, even when the item in question most often is found in plural quantities, in order to avoid the confusion possible if both rules of construction applied.* When an item is specified in the plural, the plural is intended.⁵³

In the legislative statement issued with the passage of the Dictionary Act, Congress used another term from § 548, “value,”⁵⁴ as an example of how other sections within the Code do not necessarily import the same meaning for the term when it is specified different within a particular subsection.⁵⁵ However, because the legislation was passed before RLCDDPA, there is no legislative intent in the Dictionary Act behind the use of the singular “contribution” or “transfer” in § 548(a)(2)(A). As stated in its legislative history, the Dictionary Act was meant to avoid confusion with the Code,⁵⁶ but in 1978, the Code had

⁵⁰ 11 U.S.C. § 102(7) (1978).

⁵¹ See discussion *infra* Part I.D.2.

⁵² *Contra* 1 U.S.C.A. § 1 (West 2005) (“Words importing the plural include the singular”).

⁵³ H.R. REP. NO. 95-595 (1977) (*reprinted in* 1978 U.S.C.C.A.N. 5963; S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787) (emphasis added).

⁵⁴ The legislative statement juxtaposes “value” used in § 548(d)(2) to its meaning in § 522.

⁵⁵ The precise definition of value has been litigated on occasion. See *Solow v. Reinhardt (In re First Comm. Mgmt. Group, Inc.)*, 279 B.R. 230, 239 (Bankr. N.D. Ill. 2002).

⁵⁶ See generally 11 U.S.C. § 102(1)–(8); 8 WILLIAM NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE 2D § 102, at 103 (West 2007).

not even contemplated transfers and contributions in the form of donations to charities and religious organizations. Additionally, the legislative statement accompanying the Dictionary Act instructed, “[o]ther rules of construction that are not set out in title 11 are nevertheless intended to be followed in construing the bankruptcy code.”⁵⁷ These rules of construction, of course, include plain meaning analysis by courts and the absurdity doctrine.

Courts have very sparingly, and only in regard to one other subsection of the Code, referenced § 102(7). Courts were split on the issue of whether the term “transfer” should be aggregated when interpreting § 547(c)(8).⁵⁸ In the leading case on the matter, *In re Hailes*, the court looked to the statute’s plain meaning and legislative intent, and reached the conclusion that multiple transfers should be aggregated in determining whether a certain monetary threshold was met.⁵⁹ The court used § 102(7) in support of pluralizing “transfer” in its interpretation, in reaching its conclusion that “multiple transfers to a single creditor should be aggregated under § 547(c)(8).”⁶⁰ In so ruling, the court pluralized “transfer” because § 102(7) allowed that the term “can mean more than one transfer.”⁶¹

However, this language made it clear that the court did not feel bound to use the Dictionary Act to pluralize transfer. Rather, it then briefly looked to the legislative history and intent of § 547(c)(8) before deciding that if “transfer” were interpreted in its singular form in this subsection, it “would clearly be contrary to Congress’ intentions.”⁶² But, as will be shown, RLCDDPA does not offer such clear intentions on pluralizing “transfer” or “contribution” like some other areas of law provide,⁶³ nor is its purpose in

⁵⁷ 11 U.S.C. § 102 (1978).

⁵⁸ 11 U.S.C.A. § 547(c)(8) (West 2005) (“The trustee may not avoid under this section a transfer—if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than \$600.”).

⁵⁹ Elec. City of Merch. Co. v. Hailes (*In re Hailes*), 77 F. 3d 873, 874–75 (5th Cir. 1996).

⁶⁰ *Id.* at 875; accord *Rainsdon v. Action Collection Serv., Inc.* (*In re Robles*), No. 05-42369-JDP, 2007 WL 1792320, at * 11 n.5 (Bankr. D. Idaho June 19, 2007) (citing *Geltzer’s* recent reliance upon *In re Hailes*).

⁶¹ *In re Hailes*, 77 F.3d at 874–75 (emphasis added).

⁶² *Id.*

⁶³ For instance, in *In re M.M.D. & B.H.M.*, there was a change in statutory language that helped the court evince a legislative intent behind the phraseology of the current statute and also a wholly different subject area. *In re M.M.D. & B.H.M.*, 662 A.2d 837, 847 n.11 (D.C. 1995). In this narrow case, where the controversial issue of adoption by same-sex couples was at issue, the court ruled that the party who demanded a strict statutory interpretation had the burden of showing that the contrary interpretation would be “unreasonable.” *Id.* There is no such change within RLCDDPA, and Congress did not substantively amend § 548(a)(2)(A) as part of its wholesale BAPCPA 2005 amendments.

protecting donations furthered by employing the Dictionary Act for interpretive purposes.⁶⁴

A recent case relying upon the Dictionary Act with regard to § 548(a)(2)(A) is *Geltzer*,⁶⁵ which discussed the application of § 102(7) and opted to pluralize § 548(a)(2)(A)'s provisions.⁶⁶ The case pondered the question presented here: whether § 548(a)(2)(A) refers to individual donations or donations in the aggregate?⁶⁷ In *Geltzer*, the Second Circuit mentioned *In re Hailes*'s support of aggregation in interpreting § 547(c)(8),⁶⁸ but not in conjunction with its discussion of the Dictionary Act.⁶⁹

In its brief discussion of § 102(7), the court rebuffed the Church's citations that were not from bankruptcy cases, which supported the singular construction of words unless their plural construction was clearly necessary to carry out legislative intent.⁷⁰ The court called the Dictionary Act's application to the case at hand more "straightforward" than the previous cases because the Dictionary Act is specifically a provision of the Code.⁷¹ However, it did not cite any cases, not even *In re Hailes*, in its application of the Dictionary Act to § 548(a)(2); in fact, contrary to *In re Hailes*'s assertion that § 102(7) *can* be applied and *supports* aggregation, *Geltzer* cited, with approval, the district court's usage of § 102(7) as "dispositive" in interpreting § 548(a)(2).⁷²

Ultimately, the Dictionary Act offers no clear answer to the aggregation dilemma in § 548(a)(2)(A). Even though an aggregate construction of

⁶⁴ There is another layer of complexity to interpreting § 548(a)(2)(A) since the general "definitions" section of the United States Code also governs this section's interpretation. 1 U.S.C.A. § 1 proscribes, unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C.A. § 1 (West 2005). This proscription is similar, but not identical, to the interpretative mandates of the Dictionary Act; it is unclear how these variances might effect their usefulness in interpreting § 548(a)(2)(A). It is also unclear whether the context of RLCDDPA indicates that this plural construction should not be used.

⁶⁵ *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 961 (2007).

⁶⁶ An early 20th century case, *In re Eikel*, 283 F. 285 (D.C. Tex. 1922), *rev'd*, *Robinson v. Eikel*, 285 F. 732 (5th Cir. 1922), *cert. denied*, *Eickel v. Robinson*, 262 U.S. 754 (1923), is a pre-Dictionary Act case that discusses "singular" and "plural" with regard to homestead exemptions, but it is largely irrelevant to the issue at hand.

⁶⁷ See discussion *infra* Part I.D.2.

⁶⁸ *Geltzer*, 463 F.3d at 223.

⁶⁹ *Id.*

⁷⁰ *Id.*; see *First Nat'l Bank in St. Louis v. State of Mo.*, 263 U.S. 640, 657 (1924) (holding that "obviously [the rule that the singular includes the plural] is not one to be applied except where it is necessary to carry out the evident intent of the statute."). See also *infra* note 165.

⁷¹ *Geltzer*, 463 F.3d at 223.

⁷² *Id.*

“transfer” and “contribution” would lead to a more logical result, a plain reading of § 548(a)(2)(A) refers in the singular, and no court, prior to *Geltzer*, had found that application of § 102(7) to a particular section of the Code is dispositive or mandated. However, the *In re Hailes* and *Geltzer* courts did agree that looking to legislative intent could be helpful in discerning whether to pluralize words in the Code.

C. *Legislative History and RLCDDPA*

It is inappropriate for a court to look beyond the plain language of the statute and to its legislative intent if, the law on its face is clear.⁷³ However, a “court may examine legislative history when it encounters language in a statute that is undeniably ambiguous, but it should be the final option.”⁷⁴

Even a court that looks to legislative intent may not be able to ascertain the reasoning behind the statute. The legislative process is unique and distinct from the judicial process of offering opinions, which makes application of the former to the latter a complicated process.⁷⁵ Items on the record may be there for political gain rather than clarity,⁷⁶ and even what is on the record may not reflect the views of the majority of members (who did not speak beyond their vote on the matter).⁷⁷ More objective and relevant to the RLCDDPA, though, is the fact that the legislative record is often contradictory, expressing no single-

⁷³ See *supra* text accompanying notes 36–37.

⁷⁴ *In re Demonica*, 345 B.R. 895, 904 (Bankr. N.D. Ill. 2006) (citing *Newson v. Friedman*, 76 F.3d 813, 816 (7th Cir. 1996)).

⁷⁵ For a detailed analysis of the proper considerations of the legislative process in judicial decision-making, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response*, 93 MICH. L. REV. 1 (1994).

⁷⁶ See generally *Downes v. Bidwell*, 182 U.S. 244, 254 (1901) (“The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts.”).

Representative Packard’s considerations for including charitable organizations are arguably for political gain, rather than manifesting the intent of the statute. The Representative states that, “[o]n the merits themselves, I believe that charitable organizations ought to be included,” before lauding his own accomplishments as an “original member” of the House and Senate Group Renewal Alliance whose purpose is the advancement of charitable organizations. *Religious Liberty and Charitable Donation Protection Act of 1997; And Religious Fairness in Bankruptcy Act of 1997: Hearing Before the H. Subcomm. on Commercial and Administrative Law*, 105th Cong. 13 (1998) (statement of Rep. Packard).

⁷⁷ See *U.S. v. Trans-Mo. Freight Assoc.*, 166 U.S. 290, 318–19 (1896) (“Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.”).

mindful intent at all.⁷⁸ Delving into the legislative history and intent only reveals that there was utter confusion and contradictory intent expressed by the congressmen, specifically, on whether the 15% of gross annual income allowed under the revised § 548(a)(2)(A) applied in the aggregate or merely to individual donations.

The legislative history of RLCDDPA, like that of many other statutes, is filled with contradictory statements. In particular, neither the formal legislative history of the statute, or the recorded debate and testimony are clear whether the 15% of gross annual income allowed under the revised § 548(a)(2)(A) applied in the aggregate or merely to individual contributions.

1. The House of Representatives

All Representatives who spoke on the subject were in agreement that religious institutions, who were the defendants in actions attempting to recover donations, needed protection from these actions in the wake of Supreme Court cases such as *Smith* and *Boerne*.⁷⁹ There was also general, but rather unreasoned, assent that these two Supreme Court's rulings would later produce results that would no doubt violate the First Amendment norms of religious freedom.⁸⁰

On Thursday, February 12, 1998, the House of Representatives Subcommittee on Commercial and Administrative Law discussed the more thorny issues of the constitutionality and necessity of two possible bills⁸¹ when

⁷⁸ *Id.* (“[A]ll that can be determined from the debates and reports is that various members had various views.”).

⁷⁹ 144 CONG. REC. H4000 (1998) (statement of Rep. Nadler). Representative Nadler understood the need for the RLCDDPA to address problems that began in *Smith* and recently resulted in the “unfortunate[]” decision of *Boerne* where RFRA was declared unconstitutional. *Id.* Representative Souder expressed that the “tragic result” of *Boerne* “is that churches and charities around this country are now vulnerable to aggressive bankruptcy lawyers.” *Id.* at H4004 (statement of Rep. Souder).

⁸⁰ Representative Souder stated that the current Code “violates the first amendment [sic] religious clauses of the Constitution, while encouraging an outbreak of bankruptcy litigation against the churches and other charities.” *Id.* Representative Helen Chenoweth stated (and Representative Packard agreed) that Congress’s “primary concern is that anything that we do to address this issue will not lead to the future government regulation of the church and the interference in the free exercise of religion. [W]ith the passage of H.R. 2064, we provide the Federal Government absolutely no opportunity to extend its reach to regulate churches in this country.” *Id.* at H4003 (statement of Rep. Chenoweth). See *infra* notes 166–67.

⁸¹ The Religious Fairness and Bankruptcy Act was introduced by Representative Chenoweth and the Religious Liberty and Charitable Donations Protection Act was introduced by Representative Packard.

the subject of aggregation was mentioned in passing.⁸² There were more concerns as to how the figure “15%” was reached. Mr. Ralph Hardy, Jr., President of the Washington, D.C. Stake of the Church of Jesus Christ of Latter-Day Saints, quoted the Bible, Malachi 3:8-9, which mandates “tithes,” which are 10 percent of an individual’s income. However, Mr. Hardy was quick to note that members of his church are mandated to make additional “offerings, which would bring the percentage over 10[percent].”⁸³ The 15 percent cap, and whether it was meant in the aggregate or applied to individual donations, was not central to the discussion, leaving any analysis searching for answers to questions that were barely even asked with limited fodder.

However, a definite and resolute answer was offered during congressional debate; it was just never adopted. Representative Jerrold Nadler questioned an expert in the field of bankruptcy and religion, Professor Douglas Laycock, on the issue of whether the bill applied to individual donations or in the aggregate. Professor Laycock replied that he “had not focused on this feature of the bill,” but that he believed the cap to be an aggregation.⁸⁴ He believed that there was an “unintended drafting glitch” and that an amendment to the proposed bill might clear up both the question of aggregation and whether, if a donor gave, say, 17 percent of their gross income to a religious or charitable organization, the entire transfer is avoidable, or just the amount in excess of 15 percent.⁸⁵ Professor Laycock called this point “of limited importance, because

⁸² *Religious Liberty and Charitable Donation Protection Act of 1997; And Religious Fairness in Bankruptcy Act of 1997: Hearing Before the H. Subcomm. on Commercial and Administrative Law, 105th Cong. (1997).*

⁸³ *Id.* at 56 (statement of Mr. Ralph Hardy, Jr., Pres., D.C. Stake of the Church of Jesus Christ of Latter-Day Saints).

⁸⁴ *Id.* at 69 (statement of Douglas Laycock, Professor, University of Texas Law School).

⁸⁵ Professor Laycock proposed that the portion of RLCDDPA that would amend § 548 should be amended to read:

[a] transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which— (A) the aggregate of all such contributions to such entities for any twelve-month period does not exceed 15 percent of the gross income of the debtor for the same twelve-month [now two years] period; or (B) the aggregate of all such contributions to such entities for any twelve-month period exceeds the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions. If the aggregate of all such contributions to such entities for any twelve-month period exceeds the limits set forth in this paragraph, only the excess shall be considered to be a transfer covered under paragraph (1)(B).

Id.

cumulative gifts in excess of 15 percent will be rare, and the courts might infer fraudulent intent in a high percentage of those few cases.”⁸⁶

The amendments were not made, but obviously would have clarified both the individual donation versus aggregation debate,⁸⁷ and the one centered on whether the “safe harbor” protected the portions of gifts that were in excess of 15 percent of a debtor’s gross annual income in the rare instances where these cases arise.⁸⁸ It is impossible to ascertain why the congressmen did not heed Professor Laycock’s advice to amend § 548, but it was most likely because the language was not central to the purpose of RLCDDPA or its legislative discussion.

Even without the simple amendment, congressmen still attempted to answer the individual donation versus aggregation question with some, but not complete, clarity. On the floor of the House, Representative Nadler stated that, “[t]his bipartisan legislation . . . would permit debtors in bankruptcy to continue to make donations to such organizations of up to 15 [percent] of their gross annual income.”⁸⁹ While this statement alone was ambiguous, the Representative expressed his awareness of the uncertainty in the section’s meaning when questioning Representative George Gekas, Chairman of the Subcommittee, as to the legislative intent on the matter.

Specifically on point, he asked if it was the legislation’s intent to:

protect qualified contributions of up to 15 [percent] of the debtor’s gross annual income in the aggregate for the year in which the contribution was made, and that we do not intend this language to allow multiple contributions to a given organization or to more than one organization which in the aggregate exceed 15 [percent] of the debtor’s gross annual income to be protected.⁹⁰

Representative Gekas’s response attempted to end the argument in favor of aggregation: “this legislation is not intended to diminish any of the protections against prepetition, fraudulent transfers available under section 548 of the Bankruptcy Code. [I]t applies to transfers that a debtor makes, and I emphasize this, on an aggregate basis during the one year reach-back period.”⁹¹

⁸⁶ *Id.*

⁸⁷ *See infra* Section I.D.2.

⁸⁸ *See infra* Section I.D.1.

⁸⁹ 144 CONG. REC. H4000 (1998) (statement of Rep. Nadler).

⁹⁰ *Id.*

⁹¹ *Id.* at H4000-01; *see infra* note 151 and accompanying text.

Thus, it seems clear that Representative Gekas, one of the bill's sponsors, believed RLCDDPA 15 percent restriction to be a cap on donations in the aggregate, and not only a cap on the permissible amount of individual donations. But rather than amending the bill per Professor Laycock's recommendation to clarify the issue, Congress opted to leave the bill unchanged, thereby retaining its ambiguous wording.⁹²

Agreement on aggregation was not unanimous, and some saw the 15 percent figure as a "safe harbor" rather than a cap on donations. In a letter entered into the record by Representative Ron Packard, the Christian Legal Society's Steven T. McFarland described his organization's view on the matter:

We understand that some may question whether the 15 [percent] figure in Section 3 of H.R. 2604 is a cap. *We believe the answer is clearly "no."* Rather than inviting trustees across the country to litigate over whether the tithe was a consistent practice of the donor, H.R. 2604 creates a bright-line test, a "safe harbor" that defuses this issue. . . . It would be clear, if the *donations are no more than 15 [percent]*, then trustee [sic] cannot challenge them, unless he has evidence of actual fraud (section 548(a)(1) would remain available).⁹³ With the 15 [percent] shield, Congress would be clarifying what creditors cannot challenge, not prescribing how much a donor should give. *A donor can give more than 15 [percent] of his income to charity, but will have to prove that this has been his consistent practice over several years.*⁹⁴

Mr. McFarland's statement makes it clear that he is referring to a total of 15 percent of a debtor's income receiving protection, rather than each donation of 15 percent, unless there is a consistent practice of more generous giving. Professor Zywicki, another bankruptcy expert, also discussed the 15 percent as a safe harbor but seemed less inclined for a court to use § 548(a)(2)(B) to allow gifts that had been consistently higher. RLCDDPA:

creates a 'safe harbor' which protects all such transfers up to an aggregate amount of 15 [percent] of the gross annual income of the debtor for the year in which the transfer is made . . . [t]hat figure will be sufficient to include the total contributions made in good faith by most Americans to charities and churches in any given year. . . . At

⁹² See *supra* note 85 and accompanying text.

⁹³ However, in *In re Meyer*, 355 B.R. 837 (Bankr. N.M. 2006), the court ruled that giving a "natural reading" of the Code after BAPCPA meant that above-median income debtors could not tithe.

⁹⁴ 144 CONG. REC. H4001 (1998) (emphasis added).

the same time, that amount is not so large as to interfere substantially with a creditor's ability to collect on its claim. . . . Limiting the safe harbor to 15 [percent] is designed primarily as a mechanism to prevent abuse of the provision.⁹⁵

Congressman Christopher Cannon echoed a similar test as Mr. McFarland and Professor Zywicki when expressing the congressional intent as a bright-line test for courts to use: “[r]eligious contributions by a debtor, if consistent with past practice or if totaling less than 15 [percent] of gross income, shall not be reachable by a creditor in the context of bankruptcy.”⁹⁶ While participants in the legislative process disagreed on how the provision would operate—whether it would be a cap or simply a safe harbor—most interested parties, as evidenced by the legislative history, believed the 15 percent figure to be an aggregation of all charitable and religious donations.

Still, Representative Chenoweth seemed to ignore the 15 percent cap altogether when she proclaimed, “[w]ith the passage of H.R. 2604, there is no opportunity to have the Federal Government define tithes or to place a floor *or a limit on the amount of tithes* that a parishioner can give to his or her church.”⁹⁷ This statement, obviously contrary to the plain meaning of the bill, was confirmed as the legislative intent by bill author Representative Packard.⁹⁸ Viewed together, this legislative history is not dispositive. More importantly, the plain meaning of RLCDDPA, with its unintended drafting glitch left without amendment, contrary to Professor Laycock's advice, was still hopelessly ambiguous.

2. *The Senate*

The individual donation versus aggregation debate similarly occurred in the Senate with a comparably ambiguous result.⁹⁹ Senator Charles Grassley, the sponsor of the bill in the Senate, actually alluded to the possibility that, if there were no fraud, a debtor could give all of his assets to charities in individual donations, each being less than 15% of his annual income.¹⁰⁰ In reassuring

⁹⁵ *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 105th Cong. 34–35 (1997) (statement of Todd J. Zywicki, Assistant Professor of Law, Mississippi College School of Law).

⁹⁶ 144 CONG. REC. H4004 (1998).

⁹⁷ 144 CONG. REC. H4003 (1998) (statement of Rep. Chenoweth) (emphasis added).

⁹⁸ *Id.*

⁹⁹ 144 CONG. REC. S4769 (1998).

¹⁰⁰ *Id.* (statement of Sen. Grassley).

parties that actual fraud would not be tolerated in donations, Senator Grassley stated, “if someone who is about to declare bankruptcy gives away all of his assets in donations of less than 15 [percent] of his income, that would be strong evidence of real fraud and real fraud can’t be tolerated.”¹⁰¹ This statement indicates that, if a debtor had a prior consistent practice of giving a large portion of his gross annual income in denominations of less than 15 percent, the practice would be permitted under RLCDPA.

Senator Sessions also focused on the question of fraudulent intent. He believed that under RLCDPA, “contributions of up to 15 percent of a person’s income, or a higher amount that is consistent with an individual’s past practice of giving, will not be considered fraudulent when made during the year [now two years] prior to filing bankruptcy.”¹⁰² While it is unclear whether Senator Sessions was referring to contributions individually or in the aggregate, the statement indicates that 15 percent is not a firm cap if there is evidence of consistent generous past giving, which is consistent with Senator Grassley’s statements.¹⁰³

Senator Durbin expressed that “there is a limitation in the law of 15 [percent] of your annual income that can be given [under RLCDPA]. So we don’t anticipate any type of abuse in this area.”¹⁰⁴ Again, this is consistent with Senator Grassley’s opening statement. This statement also suggests that the Senator believes in aggregation to reach the 15 percent threshold, yet he does not acknowledge that consistent past practice of giving may not mean a 15 percent cap at all,¹⁰⁵ nor does he acknowledge how his statement does, in fact, deviate from the standard of Senator Grassley’s opening remarks.

Senator Grams’s statement on aggregation is confused because, by not carefully selecting his words, he at one point alludes to an individual donation approach before then supporting aggregation. The Senator succinctly states that the bill “exempts individual tithes to churches from bankruptcy proceedings.”¹⁰⁶ He then states, perhaps inconsistently, that “[t]he exemption

¹⁰¹ *Id.*

¹⁰² 144 CONG. REC. S4771 (1998) (statement of Sen. Sessions).

¹⁰³ Arguably, the plural “contributions” implicitly aggregates the donations. However, with the controversy surrounding singular and plural applicability under the Code, and no clarification offered by Senator Sessions, the statement is not plain on its face.

¹⁰⁴ 144 CONG. REC. S4771 (1998) (statement of Sen. Sessions).

¹⁰⁵ *But see supra* notes 102–03 and accompanying text.

¹⁰⁶ 144 CONG. REC. S4772 (1998) (statement of Sen. Grams). This is, of course, a generalization that is not fully consistent with the enacted legislation. Note the Senator’s statement refers directly to tithes, and not other charitable contributions.

is up to 15 [percent] of income to prevent abuse.”¹⁰⁷ The Senator’s first statement refers to individual tithes, which would indicate that he understood the bill to restrict individual tithes, rather than tithing in the aggregate to less than 15 percent of the debtor’s income. However, in his next statement, a debtor’s income, and not individual tithes, is the basis for a statutory exemption. Not only is the Senate as a whole confused as to the aggregation question, but even individual senators are apparently befuddled on the issue.

Ultimately, were a court to look to legislative history to interpret § 548(a)(2)(A), it would be hard-pressed to evince a clear legislative intent from the congressional debate. While the analysis of the legislators’ comments was critical in singular and plural usages and sentence structure to parse through what individual legislators and experts thought with regards to aggregation, it is highly likely that their words were not chosen with such precision. Quite simply, beyond Representative Nadler’s attempt to clarify the issue and Professor Laycock’s suggested, but disregarded, amendment on donation calculation, aggregation of the donations was not a hotly contested issue for discussion. This may be one significant reason why the legislators’ remarks, when critically analyzed, show uncertainty and disunity on the issue of § 548(a)(2)(A) analysis. But while aggregation is a more logical interpretation of § 548(a)(2)(A) and the one with which most legislators would probably agree, it is not consistent with a plain meaning reading of the statute. Thus, courts are left with a conundrum: when confronted with § 548(a)(2)(A) issues, do they literally apply the statute and look at individual donations or do they follow the more logical approach and aggregate the donations?¹⁰⁸

D. Cases Interpreting § 548(a)(2)(A)

In light of this ambiguous legislative history and wording of § 548(a)(2)(A), it is not surprising that, in the few cases where courts have directly interpreted the statute with regard to aggregation, there has been some confusion. Two such cases have worked their ways through the courts to date:

¹⁰⁷ *Id.*

¹⁰⁸ Even before cases emerged exposing the ambiguities of § 548(a)(2)(A), there were calls for its clarification and amendments suggested. *See* Walsh, *supra*, note 12, at 254 (“By examining the language of the statute, one cannot decipher whether the 15 percent limit applies only to individual contributions or instead to the debtor’s total contribution for the year. Thus debtors could interpret the statute in various ways, thereby creating an ambiguity. Even the testimony of Senator Grassley, proponent for the Bill, who said a debtor may “give away all of his assets in donations of less than 15 percent of his income,” could be construed to allow multiple donations as long as they each were less than 15 [percent].”) (internal citations omitted).

*Zohdi*¹⁰⁹ and *Geltzer*.¹¹⁰ The two cases thoroughly discuss § 548(a)(2)(A), and, ultimately, reach opposite conclusions on whether the statute applies to aggregation.

1. *In re Zohdi*

The issue in *Zohdi* was whether a \$10,000 donation by the debtor to a charitable organization less than one year before filing for bankruptcy was in whole, or in part, avoidable under § 548 when the debtor's income for that year was \$43,669.00.¹¹¹ Debtor's contribution exceeded the 15 percent cap of RLCDDPA by \$3,450.¹¹² Additionally, the debtor did not have a prior practice of making charitable or religious contributions.¹¹³

Before embarking on its analysis, the court expressed its frustration with the wording of § 548(a)(2).¹¹⁴ Then the court noted what it perceived to be ambiguous directives of higher courts in interpreting the Code in general.¹¹⁵ The court continued, obviously facetiously or out of frustration, that:

[B]ecause we are not smart enough to know when it is acceptable to forget that a statute is placed within a context of others, and are made anxious by the prospect of making up what statutes should have said to get to what we want the statute to say so that it can mean that we want it to mean, we utilize a rather unimaginative version of textual construction.¹¹⁶

As such, the court proceeded with its plain meaning analysis of § 548(a)(2) even though it reasoned that Congress did not mean exactly what it said in this section's enactment.

The court applied this "unimaginative" version of statutory construction to the case:

[T]he statute refers to *a transfer* that exceeds the 15 [percent] amount. The section insulates *the transfer* (the entirety of the

¹⁰⁹ *In re Zohdi*, 234 B.R. 371 (Bankr. M.D. La. 1999).

¹¹⁰ *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 961 (2007).

¹¹¹ *In re Zohdi*, 234 B.R. at 374.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 374–75.

¹¹⁵ *Id.* at 375 n.7 (“It appears that when undertaking statutory analysis, it is acceptable at undeterminable times to dispense with contextual analysis to further the process by which a court seeks to arrive at a result that requires the disembodiment of the particular statute being dealt with.”).

¹¹⁶ *Id.*

transfer), only if *the contribution* exceeds the 15 [percent] amount, if *the transfer* “was [singular usage] consistent with the practices of the debtor in making charitable contributions” (note the plural usage which distinguishes this reference from all other references to a contribution).¹¹⁷

In its ruling, the court is transfixed by the singular/plural usage of “transfer” and “contribution(s),” and uses these variations in reaching its conclusion.¹¹⁸ In the footnote to its analysis, the court acknowledges the established rule of construction for the Code, articulated in § 102(7), that “the singular includes the plural.”¹¹⁹ However, the court is not persuaded by the necessity of its use in this circumstance, justifying this reasoning with more esoteric discussion of the importance of singular/plural usage in the Code.¹²⁰

Based upon this literal reading, the court avoided the entire charitable donation made by the debtor, and not just the \$3,450 over the 15 percent safe harbor allowed by Congress.¹²¹ Even while making this ruling, the court proposed three separate ways in which § 548(a)(2) could be rewritten by Congress if Congress believed that donations such as this one should be protected, at least in part.¹²²

The court believed that the charitable organization did “not seriously contest the plain meaning of the [RLCDPA] amendments,” but that the organization was hoping that the court would invoke the “absurdity” doctrine

¹¹⁷ *Id.* at 376 (emphasis in the original).

¹¹⁸ *Id.* at 374 (“Thus, by the terms of the statute, transfers of 15% or less are excepted from the requirement that they be for reasonably equivalent value because they are excluded from the universe of transfers that can be found to have been made for less than reasonably equivalent value.”).

¹¹⁹ *Id.* at 376 n.8. See *supra* notes 50–72 and accompanying text for complete discussion of the Dictionary Act.

¹²⁰ *Zodhi*, 234 B.R. at 376 n.8 (“We mention the distinguishing usage of plural “contributions” in the reference to the “practices” of the debtor with full recognition that § 102(7) of the Code establishes as a rule of construction that “the singular includes the plural.” We understand that when the Code refers to “a transfer” or “the transfer” it does not intend to place a limit upon the number of transfers that might be avoidable, as the plural is included in the use of the singular. However, use of the singular is instructive when the question is whether a part of a transfer is not avoidable, because the singular is used to connote a self-contained whole thing. The reference to “contributions” makes sense.”).

Id. Compare id., with *In re Hailes*, 77 F.3d 873, 875 (5th Cir. 1996).

¹²¹ *Zodhi*, 234 B.R. at 377.

¹²² *Id.* at 375 (“Our rewrites: (1) A transfer . . . shall not be considered a transfer covered under paragraph (1)(B) *in (A) an amount not to exceed 15 percent . . .*; (2) A transfer . . . shall not be considered a transfer covered under paragraph (1)(B) *up to—(A) an amount equal to 15 percent . . .*; (3) A transfer . . . shall not be considered a transfer covered under paragraph (1)(B) *except to the extent that—(A) the amount of the contribution exceeds 15 percent . . .*” (emphasis in the original, denoting changes to RLCDPA)).

to allow the group to keep the contribution.¹²³ Finally, the court refused to look at the congressional intent in adopting § 548(a)(2)¹²⁴ or the constitutionality of RLCDDPA because the court was able to resolve the case at hand by statutory means.¹²⁵

In a footnote in nonrelevant dicta, the court noted the confusion caused by the language of § 548(a)(2).¹²⁶ The court hypothesized that though the circumstances were not present in *Zohdi* “the language of § 548(a)(2) can create a *mischievous result*.”¹²⁷ When a court follows the literal congressional singular usage of “transfer” in § 548(a)(2):

[A]s the thing which cannot exceed the 15% amount, § 548(a)(2) probably requires a trustee to make a transfer-by-transfer determination, as opposed to allowing a trustee to aggregate transfers to get to an amount equal to 15% of the gross income for the year and avoid all others made within the year.¹²⁸

In this footnote, the court noted that aggregation was also a question arising when interpreting § 547(c)(8).¹²⁹

While *Zohdi*'s interpretation of § 548(a)(2) received some academic attention,¹³⁰ for more than six years¹³¹ no cases have had the opportunity to discuss the “mischievous results” that the *Zohdi* court foreshadowed. The specific factual scenario has still never fully presented itself before the courts,

¹²³ *Id.* at 381.

¹²⁴ *Id.* at 384. (“[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute” (internal citations omitted).)

¹²⁵ *Id.* at 385. The court did note, however, that another circuit had found the RLCDDPA constitutional. *In re Witt*, 231 B.R. 92 (Bankr. N.D. Okla. 1999).

¹²⁶ *In re Zohdi*, 234 B.R. at 380 n.20.

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.*

¹²⁹ See *supra* notes 68–70 and accompanying text.

¹³⁰ See, for example, *Dyer & Jones*, *supra* note 35, at 286 (“The court then looked to the text of 11 U.S.C. § 548(a)(2) and noted that the plain meaning of the text only protected individual transfers that did not exceed fifteen percent of a debtor’s income. . . . The court responded that it was not a judicial function to correct a lack of foresight on the part of Congress and that when there was a conflict between statutory wording and Congressional intent, the plain meaning of the statute would control.”)

Another legal periodical noted the court “would not consider various legislative pronouncements as to Congress’ intent in promulgating provision; language of provision was plain, and provision was part of statutory scheme that was both coherent and consistent. 3B BANKR. SERVICE L. ED. § 34:376. See also Walsh, *supra* note 12, at 412–13.

¹³¹ The six years are 1999–2006. See also Klee, *supra* note 23, at 167 n.51.

but its factual realization was one step closer in *Geltzer*¹³² with the court reaching an opposite conclusion to *Zohdi*.

2. *Universal Church v. Geltzer*

In *Geltzer*, the Second Circuit Court called itself “the first circuit to decide whether [§ 548(a)(2)] applies individually to each charitable contribution or to a debtor’s aggregate charitable contributions for the year.”¹³³ The debtor¹³⁴ filed voluntarily for chapter 7 bankruptcy relief on January 12, 2000, after accumulating approximately \$52,000 in credit card debt.¹³⁵ The court examined the debtor’s charitable giving from 1993 to 1999,¹³⁶ noting with particularity the \$22,566.97 donation to the Universal Church in 1999.¹³⁷ Clearly, this donation was well beyond 15 percent of the debtor’s income.¹³⁸ It is unclear in what denominations the gifts from 1993 to 1996 were given or how many individual gifts were made. However, between 1997 and 1999, the debtor gave “hundreds” of individual contributions, none of which, individually, were more than 15% of the debtor’s yearly income, except the \$22,566.97 donation by check in 1999.¹³⁹

Initially, the bankruptcy court avoided the individual contribution of \$22,566.97,¹⁴⁰ but it resolved the issue on state law grounds. The court noted, though, that “the literal words of section 548(a)(2)(A) state that a ‘transfer’ of

¹³² *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 961 (2007).

¹³³ *Id.* at 223.

¹³⁴ Debtor earned approximately \$65,000 a year until 1999 when she accepted a different position which earned her \$44,000 a year. *Id.* at 222.

¹³⁵ *Id.*

¹³⁶ *Id.* at 221.

¹³⁷ *Id.* at 222.

¹³⁸ The court graphed the economic analysis (by year) as follows:

	1993	1994	1995	1996	1997	1998	1999
Adjusted Gross Income	\$51,630	\$56,229	\$60,545	N/A	\$65,433	\$66,048	\$68,076
Gifts to the Church	\$0	\$0	\$0	\$0	\$47,946.77	\$20,018.31	\$11,012.20
Total Charitable Giving	\$4,684	\$3,999	\$115	N/A	\$47,946.77	\$20,018.31	\$15,960.97
% of Income to Church	0%	0%	0%	0%	73.3%	30.3%	16.2%

Id. at 221–22.

¹³⁹ Brief of Appellee in Opposition to Petition for a Writ of Certiorari at 3–4, *Geltzer*, 463 F.3d 218 (No. 06-583).

¹⁴⁰ *Geltzer*, 463 F.3d at 222.

a ‘charitable contribution’ shall not be considered to be a [fraudulent] ‘transfer’ if the amount of *that* ‘contribution’ exceeds 15%.”¹⁴¹ This plain reading of the statute by the bankruptcy court was consistent with *Zohdi*, even if it was not essential in the *Geltzer* bankruptcy court’s decision.

On appeal in the district court, the trustee won a further victory, when he successfully argued to the district court that the 15% safe harbor provision in § 548(a)(2) was based on aggregate annual contributions “rather than each individual contribution as the bankruptcy court had found.”¹⁴² During this appeal, the Church attempted to raise two additional claims: that the portion of the donation below the 15% cap could not be avoided and, because the debtor had consistently given to charity, it was protected by § 548(a)(2)(B), but, for procedural arguments, the court did not allow these arguments.¹⁴³

At the Second Circuit, the Church appealed both the ruling on aggregation and the denial of both of these defenses.¹⁴⁴ In reaching its conclusion in favor of aggregation, the Second Circuit embraced the legislative intent of RLCDDPA, rationalizing that there was ambiguity in the statute,¹⁴⁵ and that there was a possibility of absurdity if the statute was followed literally.¹⁴⁶ The court reasoned that the singular versus plural discrepancy between § 548 and other sections like § 1325(b)(2)(A)(ii)¹⁴⁷ and § 547(c)(8) in “transfer(s)” and “contribution” was ambiguous. When this indistinctness was coupled with the Dictionary Act mandate of 11 U.S.C. § 102(7) that “the singular includes the plural” and the general rule of statutory construction dictated by 1 U.S.C.A. § 1 that “words importing the singular include and apply to several persons, parties, or things; [and] words importing the plural include the singular” the

¹⁴¹ Brief of Appellant Robert L. Geltzer at 9, *Geltzer*, 463 F.3d 218 (No. 06-583).

¹⁴² *Geltzer*, 463 F.3d at 222.

¹⁴³ *Id.* Neither defense was allowed, however, as they were deemed waived when not raised with the bankruptcy court. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 223–24.

¹⁴⁶ *Id.* (Noting that looking at individual donations rather than aggregation “would be absurd because it would defeat the entire purpose of allowing trustees to protect and enhance the estate by avoiding transfers made in a specific period of time before the bankruptcy petition is filed”).

¹⁴⁷ 11 U.S.C.A. § 1325(b)(2)(A)(ii) (West 2007) (“For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended . . . for charitable contributions (that meet the definition of “charitable contribution” under § 548(d)(3) [sic] to a qualified religious or charitable entity or organization (as defined in Section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made.”).

ambiguity only grew deeper.¹⁴⁸ “Here, even if the text of § 548(a)(2) is not ambiguous when read alone, it is ambiguous when § 102(7) is considered.”¹⁴⁹ Thus, the court significantly relied upon the Dictionary Act in its ruling.¹⁵⁰

The court also relied, in part, on what it perceived to be the legislative intent behind RLCDPA in both the House and the Senate. The court cited the exchange between Representative Nadler and Gekas which indicated the congressional intent to be aggregation, rather than individual donation analysis, but discussed no other House legislative intent.¹⁵¹ Its discussion of the Senate’s intent focused entirely on the statements of a non-senator: the court only acknowledged the testimony of Professor Todd J. Zywicki to the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee which supported the position of aggregation.¹⁵² The court acknowledged how the subcommittee testimony evinces a contrary interpretation: “‘as drafted, the 15 [percent] threshold appears to apply to single contributions—allowing the possibility that multiple contributions, each less than 15 [percent] of gross income, could be immunized, even though they exceed 15 [percent] of gross income in the aggregate.’”¹⁵³ Faced with contrary Senate subcommittee statements, the court decided that its aggregation approach, like “the other, more probative legislative history, including the House Report,¹⁵⁴ all indicate that Congress intended contributions to be considered in the aggregate.”¹⁵⁵

The court also rejected several aspects of the *Zohdi* decision. It acknowledged, in a footnote of its own, that *Zohdi* reached the opposite conclusion, “albeit in dicta.”¹⁵⁶ Moreover, the *Geltzer* court gave the “mischievous result” scenario from *Zohdi* little credence and cast the court’s

¹⁴⁸ *Geltzer*, 463 F.3d at 223.

¹⁴⁹ *Id.* at 224.

¹⁵⁰ See *supra* notes 50–72 and accompanying text for a more thorough discussion of the Dictionary Act.

¹⁵¹ *Geltzer*, 463 F.3d at 224; see *supra* notes 89–91 and accompanying text.

¹⁵² *Geltzer*, 463 F.3d at 224–25 (citing *Bankruptcy Issues in Review: The Bankruptcy Code’s Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 1997 WL 612979 (1997) (statement of Todd J. Zywicki, Assistant Professor of Law at Mississippi College School of Law)); see *supra* note 95 and accompanying text.

¹⁵³ *Geltzer*, 463 F.3d at 225 (citing *The Religious Liberty and Charitable Donation Protection Act of 1997: Subcomm. on Administrative Oversight and the Courts of the S. Judiciary Comm.* 1997 WL 612960 (1997) (statement of Donald S. Bernstein, National Bankruptcy Conference)).

¹⁵⁴ The court cites only the one statement, *supra* note 89–91 and accompanying text, by Representative Gekas for the conclusory assertion that the House believed in aggregation.

¹⁵⁵ *Geltzer*, 463 F.3d at 225.

¹⁵⁶ *Id.* at 225 n.3 (citing *In re Zohdi*, 234 B.R. 371, 380 n.20 (Bankr. M.D. La. 1999)).

rationale aside perfunctorily, deciding that aggregation to 15% was both the intent and rational interpretation of § 548(a) if it is properly read with the Dictionary Act instruction that singular words¹⁵⁷ must include the plural.¹⁵⁸

The Universal Church, unhappy with the Second Circuit's decision, petitioned for writ of certiorari with the Supreme Court on October 24, 2006, to clarify § 548(a)(2)(A)'s proper interpretation.¹⁵⁹ The petition was denied by the Supreme Court on January 8, 2007.¹⁶⁰ In the petition, the Church addressed the constitutional First Amendment issues (both Establishment and Free Exercise)¹⁶¹ and the applicability and true intent of the legislature.¹⁶²

Contrary to the Second Circuit's finding that § 102(7) of the Dictionary Act dictates that the singular must be treated as the plural, petitioner asserted that the plain meaning and statutory construction actually dictates to the contrary.¹⁶³ The Church also reasoned that the Second Circuit's automatic application of the Dictionary Act would hamstring Congress if it ever intended to use the singular as the singular. In support of this assertion, the petitioner noted some of the most cited case law on the issue of singular/plural usage outside of bankruptcy law; however, these cases have little connection to bankruptcy proceedings.¹⁶⁴ Because the tithing and donation rights afforded debtors by the RLCDDPA are inconsistent with historically harsh treatments of

¹⁵⁷ In this circumstance, "contribution."

¹⁵⁸ *Id.* at 225 n.3 ("We are aware that the one other court to consider this issue reached the opposite result. . . . This decision did not consider Section 102(7) or the legislative history. . . . Thus, it does not persuade us.").

¹⁵⁹ Petition for Writ Certiorari, *Geltzer*, 463 F.3d 218 (No. 06-583).

¹⁶⁰ *Universal Church v. Geltzer*, 127 S. Ct. 961 (2007).

¹⁶¹ Petition for Writ Certiorari, *supra* note 159, at 19–22.

¹⁶² Petition for Writ Certiorari, *supra* note 159, at 9–13.

¹⁶³ Petition for Writ Certiorari, *supra* note 159, at 9–10 ("The plain meaning of the statute and its consistent use of the singular tense in its words and grammar are clear and unambiguous in requiring a transfer-by-transfer approach, which is further confirmed by comparing Section 548(a)(2)(A) to other provisions of the Act; by reviewing the statute in the context of the overall statutory scheme as enacted by Congress; and by comparing the language to related provisions of the Bankruptcy Code. . . . In subsection (A) of § 548(a)(2), the statute again uses the words "transfer" and "contribution" three times, all in the singular tense, and refers to "that contribution."—the grammar and singular tenses are consistent, uniform and clear.").

¹⁶⁴ For instance, in cases involving property rights, the court employs statutory language, logic, case law, and common law in an effort to decide whether the singular usage of a word should also include its plural, like in *State v. Hamilton*, 298 P.2d 1073, 1082 (Okla. Crim. App. 1956), where the word "owner" is used in reference to cattle grazing rights. This court also traces the history of such construction to England's parliament and thus the common law. *Id.* However, the court noted that common law also applies the plural to the singular, which the bankruptcy court expressly rejects in its legislative intent. Additionally, the court noted that it is logical to construe ownership in the plural because there are well-established property rules governing plural ownership.

debtors, the analogy from property cases may be inappropriate. With cert denied and no Dictionary Act interpretation elsewhere by the Supreme Court, there is no equivocal answer, and judges will be left sorting through the congressional ambiguity.

CONCLUSION

A. *Statutory and Constitutional Problems with § 548(a)(2)*

If the *Geltzer* application of the Dictionary Act is the legislative proscription of the Code, then all contributions would be aggregated for consideration, rather than analyzed individually.¹⁶⁵ This could lead to a bankruptcy court deciding which charitable or religious contributions should be avoided to get under the 15% cap, which implicates First Amendment concerns¹⁶⁶ that have still yet to fully present themselves.

The strongest argument against the constitutionality of the RLCDDPA would occur in a situation hypothesized in the *Zohdi* case where a debtor gives to both religious and charitable organizations, or simply to multiple religious organizations, in an aggregate amount greater than 15%, and the court interprets the Code language to allow aggregate contributions up to 15%, contrary to *Zohdi*. In this case, the court would have to decide which contributions to allow and which to avoid, inevitably entangling the decision in a religion versus charity (nonreligion) conflict that would prove to either favor religion or be hostile to it.¹⁶⁷ As such, there would be no way to avoid an Establishment Clause violation in this hypothetical.

¹⁶⁵ Appellee's Brief for the Petitioner at 10–11, *Geltzer*, 463 F.3d 218 (2d Cir. 2005) (No. 05-1757). The trustee/petitioner cites *First Nat'l Bank in St. Louis v. State of Mo.*, 263 U.S. 640, 657 (1924), and two other cases cited by the Court (*Garrigus v. Bd. of Comm'rs*, 39 Ind. 66, 70 (Ind. 1872) and *Moynahan v. City of N.Y.*, 205 N.Y. 181, 186 (N.Y. 1912)) for the proposition that § 102(7) of the Dictionary Act applies when it is obviously necessary to carry out the evident intent of the legislature. This previous version of the Dictionary Act stated similarly, but perhaps differently, that “words importing the singular number may extend and be applied to several persons or things.” *First Nat'l Bank*, 263 U.S. at 657. This Supreme Court interpretation was based on branches of national banks; it is dubious whether it is on point or appropriately extended to the modern Code; *but see* Reply to Brief in Opposition at 2–5, *Geltzer*, 463 F.3d 218 (No. 06-583) (arguing that a “mechanical” application of § 102(7), as applied by the Second Circuit, is incorrect).

¹⁶⁶ If a debtor makes both charitable and religious donations, then the bankruptcy judge is put in the precarious situation of favoring religion over nonreligion or nonreligion over religion, simply by ruling on which contributions are avoided, even if the intent is purely neutral. *See infra* note 167.

¹⁶⁷ This Comment does not attempt to provide a complete analysis of Establishment Clause issues that may arise from RLCDDPA; it simply illustrates, through this hypothetical, where issues may arise. While it is improbable that the legislation as a whole is violative of the Establishment Clause, it is still a point worth

Under the *Zohdi* narrow-but-plain construction of the statute, if a debtor makes a singular donation that exceeds 15% of his gross annual income, by even one penny, the entire transfer, and not just the portion of the transfer in excess of 15%, is voidable.¹⁶⁸ This, too, most likely runs afoul of Congress's intent in allowing smaller donations, even when a debtor is insolvent. After all, the purpose of RLCDDPA was protection of religious organizations and the donations given to them.¹⁶⁹

In light of the Dictionary Act and the more general rules of construction,¹⁷⁰ the only thing that is clear regarding aggregation is that unless the language is amended, interpretation will rest on semantics and not necessarily statutory construction or intent. Because the general canons of construction apply, the question in interpreting § 548(a) is whether the context indicates that the plural should not be understood, even though the singular is used. Religious and charitable organizations will continue to argue that plain meaning dictates that Congress drafted in the singular because it meant its words here in the singular, and trustees will continue to argue that individual donation analysis is consistent, even if consistent with a plain meaning reading of § 548(a) leads to an absurd result that is contrary to the general canons of statutory construction.

Additionally, the Dictionary Act does little to clarify the aggregation debate because there is scant legislative history and limited case law interpreting why the drafters of the Code differentiated the general canons of construction of language of any act of Congress from Code provisions. The only obvious difference between general rules of statutory construction and the Dictionary Act is that the Dictionary Act definition makes it clear that the plural does not include the singular while the rules of construction dictate plural includes the singular. But the issue at hand involves singular words (“contribution” and “transfer”), so an analysis on this issue is unaided by this difference.

The one other Code provision whose interpretation has been aided by § 102(7) is § 547(c)(8) whose purpose is quite different from § 548(a)(2)(A).

mentioning. Several courts have found RLCDDPA constitutional, including *In re Witt*, 231 B.R. 92, 97–98 (N.D. Okla. 1999). However, in the hypothetical presented in the text, the governmental entanglement with religion—one of the greatest concerns of the Establishment Clause—would be excessive under traditional Establishment Clause cases like *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1973), and *Walz v. Tax Comm'r of City of N. Y.*, 397 U.S. 664, 669 (1970), because a court could not act “neutrally” with regard to these donations.

¹⁶⁸ *In re Zohdi*, 234 B.R. 371, 377 (Bankr. M.D. La. 1999).

¹⁶⁹ See *supra* note 30 and accompanying text.

¹⁷⁰ 1 U.S.C. § 1 (2000).

Section 547(c)(8) aggregates payments to prevent multiple *de minimis* individual transfers to a single individual to total more than \$600, which is consistent with general bankruptcy principles of fairness to creditors. However, § 548(a)(2)(A) is a congressional mandate as part of RLCDPA, implying that fairness to creditors is sometimes secondary to the importance of religious beliefs and the institutions funded by these donations. Therefore, the cap of 15% is not nearly as straightforwardly applied, and to use the Dictionary Act to dispositively assert that the terms of § 548(a)(2)(A) need to be pluralized, even with unclear legislative intent, is a thinly veiled attempt at correcting poorly worded legislation through adjudication.

The absurdity argument against individual donation interpretation,¹⁷¹ which is a simple end-run around odd or mischievous results, is not within a court's discretion if the result is simply mischievous.¹⁷² The Supreme Court has made it clear that Congress must amend its own drafting glitches in scenarios such as these where a result is simply strange. The result in an individual donation analysis is not demonstrably at odds with the intentions of the drafters of RLCDPA.¹⁷³ In fact, in passing RLCDPA, it was Congress's intent to protect donations; the only question left open by § 548(a)(2)(A) is to what degree. Congress almost certainly believed donations to religious and charitable organizations should be protected in the aggregate up to 15% of a debtor's gross annual income, but the absurdity doctrine is not an appropriate means to reach this end, and the plain language of the statute indicates an individual donation analysis.

Section 548(a) should be rewritten to clearly articulate aggregation of transfers is this section's intent. Even with protection from actual fraud in § 548(a)(1)(A)¹⁷⁴ and more general protections of the Code,¹⁷⁵ aggregation is a more logical interpretation than transfer-by-transfer evaluation by a court.¹⁷⁶ The principles of fairness to creditors during bankruptcy proceedings would be disturbed if individual donations were considered in interpreting

¹⁷¹ *Universal Church v. Geltzer*, 463 F.3d 218, 222–23 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 961 (2007).

¹⁷² *See supra* notes 42, 146 and accompanying text.

¹⁷³ *See supra* note 36 and accompanying text.

¹⁷⁴ 11 U.S.C.A. § 548(a)(1)(A) (West 2007) (“The trustee may avoid any transfer . . . if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . .”).

¹⁷⁵ For example, 11 U.S.C.A. § 707(b) (West 2007) provides that “the court . . . may dismiss a case . . . if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.”

¹⁷⁶ Reply to Brief in Opposition at 5–6, *Geltzer*, 463 F.3d 218 (No. 06-583).

§ 548(a)(2)(A). Even under an aggregation analysis, a court still has significant leeway in allowing charitable and religious contributions if it believes that the donation is consistent with prior practices of the debtor, with “consistent” lacking definition.¹⁷⁷ The entire aggregation versus individual donation debate, at least, can be ended with simple congressional amends to clarify RLCDDPA’s legislative intent.¹⁷⁸

B. Possible Amendments to § 548(a)(2)

As currently worded, § 548(a)(2)(A) reads:

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—(A) the amount of that contribution does not exceed 15% of the gross annual income of the debtor for the year in which the transfer of the contribution. . . .¹⁷⁹

All references to “transfer” and “contribution” are in the singular, thus causing this interpretative debate. Both courts and scholars alike have offered suggestions to amend § 548(a)(2).

The *Zohdi* Court suggested three possible revisions to be added following the current wording of § 548(a)(2)(A).¹⁸⁰ “A transfer . . . shall not be considered a transfer covered under paragraph (1)(B) . . . in (A) an amount not to exceed 15%; . . . up to—(A) an amount equal to 15%; or except to the extent that—(A) the amount of the contribution exceeds 15%. . . .”¹⁸¹ These additions also have their vagaries and do not, most importantly, specifically direct a court to aggregate a debtor’s transfers when determining if his transfers to charitable or religious organizations are fraudulent. In all fairness to the *Zohdi* court, as it noted, it was not its job to rewrite the statute, but merely to enforce it as enacted.¹⁸² The court was also only adjudicating a singular transfer which exceeded 15% of the debtor’s gross annual income, so the mischievous results

¹⁷⁷ See *supra* note 35 and accompanying text.

¹⁷⁸ Congress has already shown a willingness to amend and clarify the RLCDDPA when necessary: the Religious Liberty and Charitable Protection Clarification Act, sponsored by Senator Hatch was signed into law on December 20, 2006. Pub. L. No.109-439, § 1 (2006). However, its purpose and application is limited to overruling an interpretation by the court in *In re Diagostino*, 347 B.R. 116 (Bankr. N.D.N.Y. 2006), that related to the contribution limits for above and below-median debtors.

¹⁷⁹ 11 U.S.C.A. § 548(a)(2)(A) (West 2005).

¹⁸⁰ See *supra* note 122 and accompanying text.

¹⁸¹ *In re Zohdi*, 234 B.R. 371, 375 (Bankr. M.D. La. 1999).

¹⁸² *Id.* at 374–75.

that were possible in situations not presented were not the focus of the court's suggestions.

In a paper written before *Zohdi* and *Geltzer*, Thomas Walsh suggested another simple revision that also called for aggregation.¹⁸³ This proposal called for § 548(a)(2)(A)'s amendment to read: "the amount of aggregate contributions may not exceed 15% of the gross annual income of the debtor for the year in which the transfer of the contribution is made."¹⁸⁴ This, however, is not the most thorough amendment to be proposed.

During the drafting of RLCDPA, Professor Douglas Laycock made an even clearer suggestion for amending § 548(a)(2). To correct the unintended drafting glitch of the proposed legislation, he proposed that the section should read:

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—(A) the aggregate of all such contributions to such entities for any twelve-month period does not exceed 15% of the gross income of the debtor for the same twelve-month period; or (B) the aggregate of all such contributions to such entities for any twelve-month period exceeds the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions. . . . If the aggregate of all such contributions to such entities for any twelve-month period exceeds the limits set forth in this paragraph, only the excess shall be covered under paragraph (1)(B)."¹⁸⁵

Professor Laycock's recommendations are thorough. Note, the proposal's last sentence reads similarly to the third proposal of the *Zohdi* court, and would have enabled this court to reach the result that it deemed right. That is, the 15% would have been a safe harbor for the debtor's transfer, and only the remainder of the transfer would have been evaluated to see if it were consistent with prior donating habits of the debtor. Thus, Professor Laycock's language would have been both consistent with the intent of RLCDPA to protect

¹⁸³ See *supra* notes 25–26 and accompanying text.

¹⁸⁴ *Id.*

¹⁸⁵ *Religious Liberty and Charitable Donation Protection Act of 1997 and Religious Fairness in Bankruptcy Act of 1997: Hearing Before the H. Subcomm. on Commercial and Administrative Law, 105th Cong. 124–25 (1997)* (statement of Douglas Laycock, Professor, University of Texas Law School); see *supra* notes 84–86 and accompanying text.

donations, and with the general principle of bankruptcy in fairness and distribution of assets to creditors.

Professor Laycock's suggested amendments to RLCDPA also would have given the *Geltzer* court a sounder justification for its aggregation approach. The proposed amendments specifically refer to aggregation of the transfers and contributions in three separate instances. Rather than reliance on legislative intent, the Dictionary Act, and the absurdity doctrine—none of which are conclusive—the court would have simply been relying upon the plain wording of the statute.

Finally, this Comment suggests one other alternative wording to consider when Congress decides to amend § 548(a)(2):

A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—(A) the *aggregate* amount of *all such* contributions does not exceed 15% of the gross annual income of the debtor for the year in which *any or all such transfers are* made; or (B) the *aggregate amount of all such* contributions made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if *any or all* transfers *were* consistent with the practices of the debtor in making charitable contributions; or (B) the *aggregate amounts of the* contributions made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if *any or all* transfers was consistent with the practices of the debtor in making charitable contributions.¹⁸⁶

These suggestions similarly specify that aggregate, not individual donations, should be considered when a court looks to § 548(a)(2) and offer necessary changes to this section of the Code.

No matter what changes Congress ultimately enacts, it is important to remember that while the singular may include the plural for statutory construction of the Code, the legislative intent behind the Dictionary Act specifies that the plural generally does not include the singular.¹⁸⁷ Thus, if Congress pluralizes “transfer” or “contribution,” like is done in this

¹⁸⁶ The emphasis indicates changes from the current statute.

¹⁸⁷ See *supra* note 53 and accompanying text.

Comment's suggested phrasing, it must clearly indicate that individual transfers and contributions are covered by the section. Ultimately, it is most important that Congress simply amend § 548(a)(2) to clarify its legislative directive from RLCDPA.

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